United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 23, 2005

TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: UFCW Local 839 (Safeway, Inc.) 554-1474-0100
Case 32-CB-5895-1 554-1475-0137-4000
554-1475-0137-8000

UFCW Local 428 (Safeway, Inc.)
Case 32-CB-5894-1

UFCW Local 1179 (Safeway, Inc.)
Case 32-CB-5896-1

UFCW Local 101 (Safeway, Inc.)
Case 32-CB-5900-1 (formerly 20-CB-12321)

UFCW Local 648 (Safeway, Inc.)
Case 32-CB-5901-1 (formerly 20-CB-12322)

The Region submitted these cases for advice as to whether the Unions violated Section 8(b)(3) by refusing to provide the Employer with information related to its grievances concerning the Unions' alleged violation of a contract term that prohibited the Union and its agents from handbilling, boycotting and/or disparaging the Employers.

We conclude that while the information requests concern a grievance over a contractual provision that is a mandatory subject of bargaining, it would not effectuate the purposes of the Act to issue a complaint. The Employer has failed to clearly demonstrate the relevance of some of the requested information, and the Union has also raised legitimate confidentiality concerns. Since the parties have agreed to arbitrate the underlying grievances, the arbitrator will be in a better position to evaluate the relevancy and rule on the production of the requested information.

FACTS

Safeway (the Employer) is a grocery retailer with stores throughout the Northern California region, employing over 10,000 employees. The charged Unions represent the Employer's employees and are each party to separate

contracts with the Employer. In 2004, the parties commenced negotiations for new collective bargaining agreements to replace the contracts due to expire in September 2004. Each of the contracts had been extended while negotiations continued. The Employer reached agreement on new contracts with the Unions in late January 2005, which were ratified on February 11, 2005.[1]

While negotiations were proceeding in the summer and fall of 2004, the Unions sent people at various times to the Employer's stores to distribute handbills to customers asking them to sign an attached pledge card to support the Unions in a boycott if one was called. The pledge card contained blanks for the customer to fill in his/her name and contact information, "so we can inform you if a boycott is called . . ." At the bottom of the card was a statement that the Unions would not share the contact information with anyone.

The Employer asserts that the Unions, in the course of conducting their pledge card campaign, violated contractual language in each of their extant collective bargaining agreements prohibiting the Unions from hand-billing, boycotting or engaging in conduct disparaging the Employer. The Employer relies on Section 17, the no-strike/no lockout section. Section 17 also contains Section 17.1, which reads as follows:[2]

> During the life of the Agreement, the Union agrees not to engage in any stoppage of work. Furthermore, the Union and its representatives, including store representatives, agree not to boycott, handbill, publicly disparage or engage in any adverse economic action against the Employer's stores covered by this Agreement.[3]

The Employer filed multiple grievances against the Unions demanding that they cease and desist from handbilling customers, and claiming monetary damages for the alleged violations of Section 17.1 of the contract.

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[1] Unless noted, all dates are in 2005.

[2] The no lockout provision is contained in Section 17.2.

[3] Store representatives appear to be unit employees who, pursuant to the provisions of Section 5.9 of the collective-bargaining agreements, are authorized at certain specified times to perform work for their Unions rather than for the Employer.

The Employer also made the following information requests to each of the five Unions:

1. Copies of all cards/handbills/pledge cards filled out
2. The total number of handbills printed for the Bay Area coalition[4]
3. Who or what entity commissioned the cards and/or paid for their printing
4. Who has the supply of unused cards
5. The names of people who brought cards to any Safeway store or location to discuss any of the issues on the card with customers
6. The amount of time spent at each location for each handbiller
7. Copies of any and all information sent to customers and employees that filled out cards
8. The name or name(s) of the custodian(s) of the completed cards
9. Is there a computer database of completed cards, and if so, who maintains it
10. A copy of any computer database with any or all of the information received in response to presenting the cards to Safeway customers
11. Copies of instructions, written or verbal to handbillers on how to get names/addresses, and what to say to customers
12. Copies of any signage used during the hand-billing
13. Has any one from the union asked anyone to honor a boycott against Safeway?

The parties exchanged a series of letters between September 27, 2004 and August 16, 2005, addressing, among other things, the Employer's information request. Although the Employer initially did not provide any reasons for requesting the information, it ultimately provided the following reasons: (1) to investigate the Unions' potential disparagement of the Employer; (2)to assess the extent of its monetary damages (in particular, the Employer claims it is entitled to the customer information on the pledge cards so it can determine if the customers' buying habits have changed); (3) to establish Union liability for all the conduct; and (4) specifically, to determine whether anyone asked the customers to boycott the Employers.

The Unions have repeatedly admitted their liability for the conduct. For instance, in a March 3 letter wherein the Unions agreed to arbitrate the grievances, their lawyer

[4] The pledge card campaign was conducted by this coalition of UFCW locals.

stated, "the Unions readily concede and they will stipulate that they were responsible for organizing the solicitation of customers to sign the pledge cards . . . ."

The Employer obtained an exemplar of the handbill and pledge card[5] and the Unions aver, without contradiction, that no other material was either passed out or mailed to customers. In further response to the Employer's request, by letter dated August 16, the Unions' attorney sent the Employer a list of dates and names of Union agents involved in the pledge card activities at various stores. The Unions further indicated that no records were kept of who assisted Union staff in the pledge card effort at the stores[6] and that,

> [o]ther than instructions as to logistical matters, when and where to do this activity, etc., the main instruction to all staff participating in this activity -- and this was true for all the locals -- was to make sure, to tell persons solicited to sign cards, that the union was *not* asking them not to shop at Safeway *now* merely to *pledge* to stop shopping if called upon by the unions, as *might* occur depending upon the progress of contract negotiations.

The Unions have refused to turn over any of the signed pledge cards. They claim the request is overly broad and that the pledge cards, attesting to an individual's potential support of the Unions, are valuable proprietary information, much like an employer's customer list. In addition, the Unions claim that disclosure of the cards to the Employer would breach the guarantee of confidentiality that was made to the customers who pledged their support.

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[5] It is not clear how the Employer obtained the sample.

[6] The Unions' lists were based upon staff member daily activity logs and similar documentation, which do not indicate names of others who helped in the pledge card effort. The Unions claim they do not have lists of individual employees, officers of other local unions, community members or other labor unions who assisted the staff members of the Unions in the pledge card activities. They also claim that, at the pre-handbilling meetings of the Bay Area Coalition of UFCW, the pledge card activities were discussed and the Unions were instructed to use only the pledge cards for customers and not to have other materials to hand out to customers. Other than these handbills, the Unions are unaware of any distribution of materials that customers could take away.

ACTION

The Unions have already supplied much of the requested information, and the Employer's request for the names of customers who signed the pledge cards for the purpose of assessing monetary damages raises confidentiality concerns and is of questionable relevance without a final arbitration decision on the merits. In these circumstances, particularly because the arbitrator will be in a better position to assess the relevance of the requested material, it would not effectuate the purposes of the Act to issue a complaint. Accordingly, the Region should dismiss these charges, absent withdrawal.

It is well settled that a union's statutory duty to supply information parallels that of an employer.[7] A party is obligated to provide requested information that may prove relevant to contract negotiation and contract administration, including determinations of whether to file a grievance, whether to proceed to arbitration, and what position to take once a grievance has been filed.[8] However, neither party has any obligation under either Section 8(a)(5) or 8(b)(3) to provide information regarding a permissive subject of bargaining.[9]

Initially we conclude that Section 17.1 of the contract, which, as described above, prohibits the Union and its representatives, including unit members serving as store representatives, from boycotting, handbilling, or publicly disparaging the Employer, is a mandatory subject of bargaining. In that regard, the clause in question is similar to a traditional "no strike" clause, long considered a mandatory subject,[10] because it specifically prohibits disruptions, such as the instant handbilling, at

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[7] Firemen & Oilers Local 288 (Diversy Wynandotte), 302 NLRB 1008, 1009 (1991); Service Employees Local 144 (Jamaica Hospital), 297 NLRB 1001, 1003 (1990); Teamsters Local 851 (Northern Air Freight), 283 NLRB 922, 925 (1987).

[8] Jamaica Hospital, 297 NLRB at 1002-1003.

[9] Pieper Electric, Inc., 339 NLRB 1232, 1235 (2003) (union not entitled to names of employees who participated in employer's stock purchase plan, because the plan, and the contractual provision restricting stock ownership by covered employees, were permissive subjects).

[10] NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941); Shell Oil Co., 77 NLRB 1306 (1948).

the work-site. In addition, this term, like a no-strike clause, is subject to the grievance-arbitration clause contained in the contract. In these circumstances, since Section 17.1 of the parties' contract concerns a mandatory subject of bargaining, the parties owe each other reciprocal duties under Sections 8(a)(5) and 8(b)(3) to provide information.

Section 17.1 is unlike the clause at issue in Mental Health Services, Northwest, 300 NLRB 926, 927 (1990) where the Board found a provision prohibiting the union and employees from making any attempts to influence the employer's public funding sources was a permissive subject of bargaining. In that case, the clause was an independent contract term, i.e., unattached to a no-strike clause, and broadly covered employees' activities away from the work-site. Here, as noted above, Section 17.1 is more specific and reaches the handbilling that occurred here, specifically directed at the Employers' customers and which, in fact, did occur outside the Employer's facilities. Thus, based on these factual distinctions, Mental Health Services, supra, is inapposite.

However, the relevancy of the Employer's request is far from certain. Indeed, the Employer's request for all of the pledge cards or a representative sample of them for the purpose of assessing monetary damages may well be too attenuated from any statutory purpose to be relevant under the Act, and is premature since the merits of the grievance have yet to be determined. Additionally, as noted above, individuals who signed pledge cards were given guarantees of confidentiality when they executed the cards. In view of the fact that the arbitrator will be in a better position to assess the relevance of such information, we find that issuing a complaint in this matter would not effectuate the purposes of the Act.

In all these circumstances, the charges should be dismissed, absent withdrawal.

B.J.K.